83-441

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ALEXANDER L. STEVAS,
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No. _____

IN THE

Supreme Court of the United States

October Term, 1983

STANLEY YALKOWSKY,

Petitioner,

–against–

HONORABLE MILTON MOLLEN, Presiding Justice of the Appellate Division, Second Department of the Supreme Court of the State of New York; MR. IRVING SELKIN, Clerk of the Appellate Division, Second Department of the Supreme Court of the State of New York; HONORABLE DAVID T. GIBBONS, Justice of the Appellate Division, Second Department of the Supreme Court of the State of New York; HONORABLE MOSES M. WEINSTEIN, Justice of the Appellate Division, Second Department of the Supreme Court of the State of New York; HONORABLE GUY MANGANO, Justice of the Appellate Division, Second Department of the Supreme Court of the State of New York; and HONORABLE LEON LAZER, Justice of the Appellate Division, Second Department of the Supreme Court of the State of New York,

and

ROBERT H. TEMBECKJIAN, Clerk of the Commission on Judicial Conduct of the State of New York; GERALD STERN, Administrator of the Commission on Judicial Conduct of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether it is a violation of the appellant's constitutional rights under the Due Process Clause of the fourteenth Amendment to deny appellant self-counsel and court by causing his appeal to be in effect heard for the first time in the United States Supreme Court.

2. Whether the appellant's protections under 42 U.S.C, Section 1983 of the Civil Rights Act guaranteeing the appellant family and fatherhood had been denied by the lower court's failure to grant injunctive relief.

(a) Whether 1983 relief applies to lower grade officials.

3. Whether the District Court and the Court of Appeals decided federal questions of substance in a manner not in accord with applicable decisions and in direct contradiction to the correct holdings cited. (See appellant's brief

to the Court of Appeals, Exhibit A).

3(a). Whether Judge Stewart incorrectly interpreted plaintiff's claim to mean that state law was improperly applied and thereby ruled erroneously that no federal constitutional protection under Section 1983 had been violated.

3(b). Whether Judge Stewart was biased, resulting in incompetent reasoning to support his denial of due process.

3(c). Whether judicial notice should be taken of the existence of implied, if not actual, bias against litigants bringing actions against judges in the courts.

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Parties to the Proceeding

The caption contains the names of all parties proceeding before the Court of Appeals and the District Court.

Opinions Below

The order and opinion of the United States Court of Appeals for the Second Circuit appears in the Appendix *intra* at 1A.

The order and opinion of the United States District Court for the Southern District of New York appears in the Appendix *intra* at 4A.

Jurisdiction

The order or judgment of the Court of Appeals for the Second Circuit was entered on June 17, 1983 (See 1A). The petition for certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

Constitutional Provisions and Statutes Involved

Fourteenth Amendment:

". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of Facts

The plaintiff presented clear, concise and dramatic violations of his constitutional rights by justices and clerk of the Appellate Division, Second Department, and by staff of the Judicial Conduct Commission. Included in the charges was actual fraud and self-dealing. (Plaintiff's Brief to the Court of Appeals, pp 4-8, Exhibit A). No doubt the factual claims of the plaintiff were unpopular. Nonetheless, they were true and supported by taped conversations, as well as other evidence that unmistakably described a corrupt judiciary in the state courts, which had infiltrated the Federal Court, Southern District itself.

The presented matters, unfortunately, were suppressed, and the plaintiff denied due process, in a vindictive

display of vengeance by such judges of the federal court as Thomas Griesa of the Southern District, and Ellsworth Van Graafieland of the Court of Appeals, Second Circuit.

Judge Charles Stewart, who originally dismissed the plaintiff's complaint on motion of the defendants, utilized legal precepts, long since reversed, in his efforts to deny the plaintiff a forum to be heard. Judge Stewart extended himself to even contradicting prior decisions of his very own, in his resolve at denying the plaintiff his right to be heard.

Virtually all the issues presented by the plaintiff were ignored by a federal judge, who was himself tainted by the interference and influence of Federal Judge, Thomas Griesa, who had inappropriate contact with Judge Stewart, and who did so taint and disrupt the

fair disputation of legal proceedings. (Appellant's Brief to the Court of Appeals, pp 30, 31, Exhibit A).

Indeed, injunctive relief pursuant to 42 U.S.C., 1983 was improperly denied by Judge Stewart, who failed to comprehend that 1983 relief applies to lower grade officials. In addition, Judge Stewart incompetently, whether feigned or by design, interpreted the plaintiff's claim to be under state law and not a federally protected constitutional claim entitled to protection under Section 1983.

As a result, the Judicial Conduct Commission staff, consisting of Gerald Stern, the Administrator, and Robert Tembeckjian, the Clerk, were enabled to not perform their duties as enjoined upon them by law, thus endorsing and permitting cruel and disgraceful misconduct by certain state court

judges, which resulted in (1) the violation of the plaintiff's constitutional rights to the safeguard of his family and enjoyment of his civil rights to fatherhood; (2) and the enabling of personal property to be taken away under color of law by the immoral and improper joinder of justices of the Appellate Division and justices of the Supreme Court, with others, all in violation of the plaintiff's civil rights and fourteenth Amendment rights.

While it is true that many of the requests for relief sought in the original motion were rendered moot by later decisions, the plaintiff did bring a valid and properly pleaded claim seeking the enjoinment of the Appellate Division justices, particularly Milton Mollen and his clerk, Irving Selkin, from depriving the plaintiff of his civil rights.

The denial of the plaintiff's civil rights and the actions described concerning Irving Selkin, the Clerk of the Appellate Division, Second Department who utilized a very powerful control over the decisions in the Appellate Division, particularly on motions, was described accurately and did show oppression, abuse of power and denial of civil rights by Irving Selkin, the Clerk of the Appellate Division, Second Department, who utilized his position of power in such a way as to cause harmful and debilitating grief to the plaintiff and his family.

The plaintiff's complaint described the conduct leading to the bringing of this motion on pages 38 to 51 of the Appendix (Exhibit A) provided herein, and in addition, described the insidious conduct of Gerald Stern and Robert Tembeckjian of the Judicial Conduct

Commission, whose acts denied the plaintiff due process and protection from oppression by their failure to perform their duties enjoined upon them by law, which if performed properly and legally would have led to the investigation of the misconduct of Judge William Walsh of the Supreme Court of Westchester County.

It was also described in the plaintiff's motion that Gerald Stern and Robert Tembeckjian did abuse the power entrusted in them, which exist for the public's benefit, by suppressing evidence and by utilizing secrecy in an inappropriate manner, in that they refused to provide any explanation as to what evidence they had utilized and presented to the Commission for investigation, when the only evidence presented was that of the plaintiff, and it was only that part of the

plaintiff's evidence which the plaintiff submitted that he sought to know was provided to the Commission. Nonetheless, based on a false claim of secrecy, Stern and Tembeckjian refused to state that which they submitted of the plaintiff's information to the Commission.

As a direct result of the failure of the Judicial Conduct Commission to perform its duties, and their refusal to perform duties enjoined upon them by law, the plaintiff was denied the lawful custody, visitation and relationship with his children, without hearing or trial. And an illegal decision of a justice of the Supreme Court, William Walsh, endorsed by an illegal decision of a justice of the Appellate Division, Milton Mollen, did result in the loss of a constitutionally guaranteed right to family by the plaintiff.

The plaintiff presented numerous exampled of roadblocks and sabotage set up by the Appellate Divisions and justices of the Supreme Court to defend against the plaintiff's charges once the plaintiff brought action concerning these illegal acts.

In addition to the roadblocks and sabotage described herein, the Judicial Conduct Commission aided these efforts by their inter-connection with Justice Milton Mollen and Irving Selkin, and by their close relationship in which Justice Milton Mollen often sits as the presiding justice on matters concerning the removal from the judiciary of those charged with misconduct before the Judicial Conduct Commission.

Judge Stewart in his decision stated, "We are unwilling to accept such a sweeping indictment," (intra 7A), and such statement by a justice of the

federal court was a conclusion without merit, and merely a biased statement of a justice willing to protect his peers, despite the evidence to the contrary.

Described in the plaintiff's brief to the Court of Appeals and herein (Exhibit A), are numerous examples of an Appellate Division, Second Department's incredible actions.

Facts will show that the plaintiff presented to Justice Stewart conduct of a Supreme Court Justice of the State of New York, Justice William Walsh, that was nothing less than awful by any standard, and which were acts that demanded the performance of the duties of the Judicial Conduct Commission, which were denied by such Commission, despite the judge's illegal and even criminal acts, which were falsely interpreted as merely judicial decisions capable of appellate

review, which they were absolutely not capable of appellate review and were exactly the type of infractions requiring the Judicial Conduct Commission to act in behalfof the public (Appellant's Brief to the Court of Appeals, pp. 6-8, 19, 20) (Exhibit A).

The reasons why the Judicial Conduct Commission did not act have already been provided and described herein, and include the interrelationships and friendships of very well-connected justices with such Commission, which has resulted in a denial of due process to the plaintiff and failure and refusal of the staff of such Commission to do those functions enjoined upon them by law, resulting in the hardships suffered by the plaintiff and his family.

In effect, Judge Stewart denied the plaintiff a forum to be heard and his

right to counsel, and Justice Van Graafieland of the Court of Appeals endorsed this denial, and in so doing denied the plaintiff all lower court proceedings, resulting in this really and truly first action being brought to the Supreme Court of the United States where the plaintiff will attempt to present facts and evidence that were never controverted, and are incapable of being controverted.

The background for denying the plaintiff-appellant a forum to be heard is provided in the appendix to the plaintiff-appellant's accompanying writ of certiorari (Yalkowsky v. Neale, et al) which is being presented to the United States Supreme Court for this same Term. (See 32A-68A of Yalkowsky v. Neale, et al.)

Summary of Facts

The overriding factors concerning this appeal is the deprivation to the plaintiff of his children, of whom he had joint custody, by illegal acts of certain justices of the state courts, without hearing or trial or legal modification, and that recourse to the State Judicial Conduct Commission failed to redress this conduct, when they deliberately failed and refused to conduct their official duties as enjoined by law, thereby depriving the plaintiff of his most basic constitutional guarantees of the tradition and institution of the family.

Coupled with this main factor is the oppression and suppression by the judiciary of both state and federal courts in a retaliatory joint effort to prevent plaintiff from exposing abuses

in the judiciary, which were an out-growth of the plaintiff's loss of his family. (See Yalkowsky et al. v. Shedler et al writ of certiorari presented to this United States Supreme Court for this same Term, pp. 31-33, 29A-46A).

Reasons for Granting the Writ

Injunctive relief pursuant to 42 U.S.C., Section 1983 was improperly denied by Judge Stewart. Judge Stewart's decision and citing of law were woefully defective and misapprehended decisional law, and totally ignored the plaintiff's facts describing willful misconduct by the Appellate Division, Second Department, which resulted in denying the plaintiff his right to counsel, oppression and the denial of the constitutionally guaranteed right to visitation with his children.

It should be noted that before we proceed to the arguments presented by the plaintiff, that were never addressed by the defense, nor appropriately responded to by Judge Stewart but were ignored despite their legal validity and their correct quality, that as a result of such conduct by the justices of the

federal court these legal precepts are presented for the first time to the United States Supreme Court.

Point I

Whether it is a violation of the appellant's constitutional rights under the Due Process Clause of the Fourteenth Amendment to deny appellant self-counsel and court by causing his appeal to be in effect heard for the first time in the United States Supreme Court

The plaintiff was denied a court of appeals and his right to due process, in that Justice Van Graafieland, acting arbitrarily, visciously and vindictively, and in an effort to deny the plaintiff his right to be heard, maneuvered and manipulated matters out of sequence to that in which they were originally scheduled, and arranged by design to have the plaintiff's arguments presented on a day when Justice Van Graafieland knew

the plaintiff to be recovering from surgery* .

In addition, and in a continuation of the actions of the Appellate Division, Second Department, and with full knowledge that the plaintiff possesses highly explosive testimony bearing on the misconduct of justices of the Appellate Division and justices of the federal court, did by such actions deprive the plaintiff of a forum to be heard, and did deny the plaintiff his right to be heard in the Court of Appeals by such maneuvers and manipulation, which included that in the event the plaintiff were even to appear in such court that he be allowed only five minutes argument time, when the issues, as can be readily seen by

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Footnote:

*Judge Van Graafieland went as far as to schedule for June 13, 1983 a case previously scheduled for July 11, 1983.

any fair-minded justice, were complex and did require far more argument time than that allotted by Justice Van Graafieland, whose activities during the granting of motions consisted of making oppressive incognito decisions, requiring the plaintiff to make motions to remedy such decisions, which were uniformly denied by Justice Van Graafieland, despite the reasonableness of the plaintiff's motions and the totally unreasonable, if not oppressive, dictates and orders of Justice Van Graafieland. (See appellant's motion to the Judicial Council, Exhibit B).

Justice Van Graafieland ordered to be heard on the same day the appellant's three appeals, including this instant appeal, such order having been made by Justice Van Graafieland without a motion even being presented to him, but made by his own arbitrary initiative to prevent

the plaintiff from exposing evidence of fraud and corruption possessed by the plaintiff. And in addition, motions made by defense counsel, based on false affidavit, with evidence presented of such falsity by the plaintiff, were nonetheless granted to the defendants without disputation of issue, in Justice Van Graafieland's further efforts to harm and deny the plaintiff his day in court.

That indeed, within four days of the return date, and on June 17, 1983 Justice Van Graafieland dismissed all the plaintiff's claims and charged the plaintiff double costs, in his vindictive design to cause hardship upon the plaintiff. As a result, the plaintiff presented no oral argument and his written arguments were ignored, and the decisions of the lower court affirmed by Justice Van Graafieland, without any legal consideration of the issues presented.

Point II

Whether the appellant's protections under 42 U.S.C., Section 1983 of the Civil Rights Act guaranteeing to appellant family and fatherhood had been denied by the lower court's failure to grant injunctive relief.

The Lower Courts

The attorney for the defense in moving for dismissal of the plaintiff's action, recited cases and reasoning that were thoroughly overcome by the plaintiff's reply brief point for point, and left nothing to be decided other than for Judge Stewart to grant the plaintiff's application. Nonetheless, Judge Stewart in his decision granting the defendant's motion, cited cases and presented arguments which were woefully defective, and included in support of his decision footnotes, incompetent in content, which displayed an extreme bias to dismiss the plaintiff's application and deny the

plaintiff his injunctive relief. The plaintiff presented justifiable need for injunctive relief. The plaintiff described terrible acts of misconduct by the Appellate Division justices and personnel. The plaintiff described that the Appellate Division leaked private and personal information to defense counsel, information impermissible to be divulged. The plaintiff described how the Appellate Division required the posting of a bond to appeal and would not permit the plaintiff to obtain the moneys in order to post such bond for appeal, by refusing to lift restraints that were placed on such accounts by defense counsel. This included the Appellate Division's refusal to permit the plaintiff to buy minutes to perfect his appeal with such moneys. The Appellate Division ruled, without hearing or trial, and despite the plaintiff's

lawful right to visitation with his children, that Judge Walsh's denial of such visitation without hearing was permissible, an act so heinous as to be against not only the Constitution, but against every human right existing in man.

While judges may be immune from certain damage actions a judge is not immune from injunctive relief. Furthermore, the Court of Appeals of the Second Circuit held in 1977, 554 Fed. 2d 534 in Person v. The Association of the Bar of the City of New York, Supreme Court, Appellate Division, First Department, Supreme Court, Appellate Division, Second Department and Attorney General of New York State, stated:

> ". . . That this suit for declaratory relief is maintainable against defendants-appellants under 42 U.S.C., Section 1983. Although a judge is exercising his judicial function, he is not liable for

> damages under 42 U.S.C., Sec 1983 (Pierson v. Ray, 386 U.S. 547, 553-555 [1967]). The immunity of judges has been held in a number of cases not to extend to action for injunctive relief . . ."

This holding was germane and appropriate to the action brought by the plaintiff herein, and supports the view that the action should have been maintainable, and that Judge Stewart was incorrect in determining that it was not. Furthermore,

> "Government officials may be held liable under the Civil Rights Act for failure to do what is required, as well as for overt activity which is unlawful and harmful - 42 U.S.C.A., 1983. (Doe v. New York City Dept. of Social Services, 649 F. 2d 134 [1961])"

> "There are two fundamental requisites for civil rights act liability to be imposed. First is that omissions must have been substantial factors leading to denial of constitutionally protected liberty or property interest; and second, is that officials in charge of agencies being sued must have displayed a mental state of

> deliberate indifference in order to be meaningfully found culpable - 42 U.S.C.A., 1983. (Doe v. New York City Dept. of Social Services, supra)."

Furthermore, in Briggs v. Goodwin, 374 Fed. Supp. 1228 it was stated:

> ". . . Typical suits against prosecuting attorneys involved allegations of malicious prosecution being deliberate use of false testimony, or deliberate suppression of exculpatory evidence, in all these situations jury discretion is brought to bear in evaluating the persuasiveness of the prosecution's presentation, and defense counsel enjoins the tribunal to employ a variety of procedural devices to challenge the accuracy of the government's position and thereby to preserve the integrity of the truth-seeking enterprise . ."

The reasoning logically follows that when an action may be maintained for "constitutional suppression of exculpatory evidence," its maintenance as an action should all the more be valued when there is "constitutional suppression of incrimininatory evidence," as in Yalkowsky.

In determining whether mandamus should be permitted, the question is (i) is there a duty? (ii) Was such duty unreasonably withheld?

> "Mandamus is employed to compel the performance, when refused, of a ministerial duty. This being its chief use, it also is employed to compel action, when refused, in matters involving judgment and discretion . . ."
>
> ". . . When a duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command, is regarded as being so far ministerial that its performance may be compelled by mandamus unless there be provisions or implications to the contrary . . ."

Furthermore, the Court of Appeals declared that:

> "Non-reviewability must be established by clear showing of congressional intent to preclude review . . . especially when an agency has resolved a pure question of law . . . Courts have special competence and judicial review is clearly the norm. (See Natural Resources Defense Council v. Security and Exchange Commission, 606 F. 2d 1031 (1979).

No statute nor law has been raised by the defense to show any intent to preclude review. Injunctive relief was appropriate and proper as presented by the plaintiff.

The better approach is to assume jurisdiction of 1983 claims.

> "Where a litigant raises claims under the civil rights statutes, even though a complaint appears to be insubstantial, the more judicious approach is to assume jurisdiction and then decide whether the pleading states a claim for relief." (See U.S. v. Guest, 383 U.S. 745, 756 86 S.Ct. 1170, 16 L.Ed. 239 (1966); Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773 90 L.Ed. 939 (1946); Rhodes v. Meyer, 334 F. 2d 709 (8th Cir. 1964) cert. denied, 379, U.S. 915, 85 S.Ct. 263, 13 L.Ed. 2d 186 (1964); Jemazura v. Belden, 281 F. Supp. 200 (N.D.N.Y. 1968); Joe Louis Milk Co. v. Hershey, 243 F. Supp. 351 (N.D. Ill. 1965); Olson v. Board of Ed., 250 F. Supp. 1000 (E.D.N.Y. 1966); Campbell v. Glenwood Hills Hospital Inc., 224 F. Supp. 27 (D. Minn 1963); Stambler, et al. v. John J. Dillon, et al., 302 F. Supp. 1250).

Point II(A)

Whether Judge Stewart failed to comprehend that 1983 relief applies to lower grade officials

Judge Stewart failed to comprehend that 1983 relief applies to lower grade officials, stating in his decision:

> ". . . Much that the plaintiff would have us enjoin defendants Stern and Tembeckjian to do is beyond their powers as Administrator and Clerk of the Commission . . . The Clerk and Administrator of the Commission are neither the Commission nor members of it."

Judge Stewart failed to recognize the existing law regarding supervisory officials, which holds that:

> "Supervisory officials or agents may be held liable under 42 U.S.C.A., 1983 . . . Supervisory officials may be held responsible for the acts of agents who were negligent or contrary to instructions, but rather on the theory that it was the appellees' own conduct which resulted in the constitutional deprivement. It is not necessary for Section 1983 that the appellees direct any particular action with respect to these individuals, only that they affirmatively promoted a policy

which sanctioned the type of action which caused the violation. In short, this is not a case of policy-making which may have caused the misconduct." (Chalaly v. Medrado, 416 U.S. 802.)

"Where conduct of the supervisory authority is directly related to the denial of the constitutional rights, it is not to be distinguished as a matter of causation upon whether it was action or inaction." (Burton v. Bloomington Parking Authority, 365 U.S. 715

Furthermore, under Civil Rights Law:

"A private citizen who acts in concert with state or local official may in some cases act under color of state law for purposes of civil rights statute establishing liability of any person who under color of law deprives another person of his civil rights." (42 U.S.C., 1983).

Point III

Whether the District Court and the Court of Appeals decided federal questions of substance in a manner not in accord with applicable decisions, and in direct contradiction to the correct holdings cited

Judge Stewart utilized inadequate, if not incompetent, law in reasoning that the defendants, Gerald Stern and Robert Tembeckjian of the Judicial Conduct Commission -

> ". . . resemble a state prosecutor's office charged with the responsibility of determining what are offences and whom to prosecute" (intra 9A),

citing Hassan v. Magistrates Court of New York, 20 Misc. 2d 509 (Supreme Court 1959); and furthermore, in stating -

> "Judicially, courts are reluctant to interfere with the exercise of such discretion" (intra 10A),

citing Inmates of Attica Correctional Facilities v. Rockefeller, 477 Fed. 2d 275, 383 (2d Cir. 1973), to arrive

at his decision that, ". . . intervention in this case would be similarly inappropriate." (intra 10A).

In fact, prosecutors have distinct congressional discretion which have not been granted to the Judicial Conduct Commission, nor to the justices of the Appellate Division, as described herein. Both Hassan (supra) and Inmates of Attica (supra) refer to prosecutors. And even in the framework of Attica (supra) the Court noted in that matter:

> "The U.S. attorneys are authorized and required to institute prosecutions against all persons violating any of the provisions of 19 U.S.C., Sections 241, 242."

But also reasoned that this mandatory language "has never been brought to preclude the exercise of prosecutorial discretion." But it must be understood that the argument presented in Attica (supra) only applies to the provisions of 19 U.S.C., Sec. 241, 242 and did not

deal with Section 1983 of the Civil Rights Act. And it was even further held in Attica, even within the limited question of whether a criminal prosecution should be mandated that:

> "To mandamus a particular prosecution a court would have to determine that no legitimate consideration informed the prosecutor's decision not to prosecute the individual in question . . ."

So even in the limited discussion within the improper analogy submitted by Judge Stewart, there still remains legitimate disputation of fact to determine whether discretion was abused, and thereby due process denied to the plaintiff by Judge Stewart.

In fact, mandamus and injunctive relief do lie, and is the appropriate remedy in this matter where as a result of the failure to act by the staff of the Judicial Conduct Commission, the plaintiff was denied his constitutional

guarantee of equal protection under the law, resulting in gross deprivations of federally guaranteed rights of the plaintiff by the capricious and unlawful withholding of such rights by the defendants.

> "Government officials may be held liable under the Civil Rights Act for failure to do what is required, as well as for overt activity which is unlawful and harmful - 42 U.S.C.A., 1983." (Doe v. New York City Dept. of Social Services, supra).
>
> ". . . There are two fundamental requisites for Civil Rights Act liability to be imposed. First is that omissions must have been substantial factors leading to denial of constitutionally protected liberty or property interest; and second is that officials in charge of agencies being sued must have displayed a mental state of deliberate indifference in order to meaningfully be found culpable - 42 U.S.C.A., Sec. 1983." (Doe v. New York City Dept. of Social Services, supra).

In Imbler v. Pachtman, 424 U.S. 409, the Court reasoned:

> "The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions established by the evidence at trial."
>
> ". . . Accordingly, lower courts have held that unconstitutional suppression of exculpatory evidence is beyond the scope of "duties constituting an integral part of the judicial process," and have refused to extend judicial immunity to suits based on such claims. Hilliard v. Williams, 465 Fed. 2d 1212. . . Most such violations never surface. It is all the more important then to deter such violations by permitting damage actions under 42 U.S.C.A., sec. 1983 to be maintained in instances where violations do surface."

In Briggs v. Goodwin, 384 F. Supp. 1228, it was stated:

> ". . . Typical civil suits against prosecuting attorneys involved allegations of malicious prosecution, deliberate use of false testimony or deliberate suppression of excuopatory evidence. In all these situations jury discretion is brought to bear in evaluating the persuasiveness of the prosecution's presentation, and

> defense counsel enjoins the tribunal to employ a variety of procedural devices to challenge the accuracy of the government's position and thereby to preserve the integrity of the truth-seeking enterprise. . ."

Furthermore, Judge Stewart denied the plaintiff due process, in that while acknowledging the plaintiff's claims of motions being dismissed against him without reason, and the laws of the state defied by the defendants, and appeal only being able to be brought to the courts charged by the plaintiff of constitutional deprivations, Judge Stewart ruled without disputation of fact or hearing, "we are unwilling to accept such a sweeping indictment." Judge Stewart in effect made a factual determination and in doing so did deprive the plaintiff of counsel and his fourteenth Amendment rights.

In other words, for Judge Stewart to maintain his adherence to a tradition of reluctance to "interfere with the exercise of such discretion" (35), (even though such discretion was inapplicable to the defendants) he had to deny the plaintiff's request for injunctive relief, despite the plaintiff's presentation of the most major acts of illegal deprivation of his constitutional rights by the defendants, as described:

1. The Appellate Division aiding in a fraud upon the plaintiff was ignored, as well as the facts supporting such allegation.
2. The denial of the plaintiff's visitation illegally and with its concomitant destruction of the plaintiff's family was ignored, illegally.

3. The prevention of the plaintiff's right to appeal, even though the plaintiff managed to appeal by resorting to the most extreme resources in order to overcome the vile restraining acts of the Appellate Division, was ignored.

4. The actions of Mr. Selkin, whose conduct, corrupt in nature, was described, was ignored, as well as his conspiratorial relationship with others ignored.

5. That decisions were made by the Appellate Division requiring impossible acts to be performed, that were only changed as a result of the plaintiff having brought an action in the federal court, such changes having occurred on their own volition, since the

obviousness of their malice was exposed -- this too was ignored.

6. The plaintiff described how at first they required a consolidation of his appeals and required the transcription of thousands of pages within weeks, something obviously impossible.

7. The plaintiff also described how they prevented him from obtaining the minutes of the trial by not enabling him to pay for the minutes; how they failed to forward evidence of the misconduct of Judge William Walsh and the attorneys to the respective commissions set up for such purpose; and again how Irving Selkin conducted himself in controlling matters before the Appellate Division, and 'getting'

> stays for him, that were denied for no reason at all when previously sought.

When one reads the claims that the plaintiff presented concerning the conduct of Judge William Walsh and the awful acts of that judge, who cannot be described in any less endearing terms than as a man of evil propensities; and when one reads the complaint concerning the Judicial Conduct Commission and their duties, and how they responded, there can leave no doubt that that Judicial Conduct Commission, by the conduct of Stern and Tembeckjian, requires the granting of the plaintiff's application. The plaintiff described how the judge -

> (1) used the trial to find out what evidence the plaintiff had about him and what was submitted to the Judicial Conduct Commission;

(2) ran from the bench to avoid a witness testifying;

(3) threatened to have a 20 year-old daughter of the plaintiff picked up by the sheriff unless she testified personally and privately with the judge in his chambers, without counsel;

(4) lied in open court to jurors;

(5) heard massive evidence of criminal conduct by witnesses and helped them and urged them not to make any more admissions;

(6) knowingly endorsed false submissal of affidavits;

(7) illegally deprived visitation;

(8) conducted ex-parte conferences with defense counsel;

(9) urged the defendant to disobey standing orders.

These are not exaggerated statements, these all occurred, and one has

to ask oneself, what does discretion mean? Had plaintiff slipped into these allegations that Judge Walsh shot him or caressed his daughter, would that still be to the discretion of the Judicial Conduct Commission? These are only some of the acts of Judge William Walsh; there are more. And with the Judicial Conduct Commission standing on its "discretion," Judge Stewart upholding this right to "discretion," and Judge William Walsh hiding behind his immunity, raise an issue that can only be determined by this United States Supreme Court -- an issue of deep oppression and violation of our constitutional safeguards.

Point III(A)

Whether Judge Stewart incorrectly interpreted plaintiff's claim to mean that state law was improperly applied and thereby ruled erroneously that no federal constitutional protection under Section 1983 had been violated.

What Judge Stewart called a misapplication of state law was in effect a deprivation of the plaintiff's right to family, a federally protected right of the highest order, and Judge Stewart's decision is a denial of protections mandated by Section 1983. Judge Stewart failed to comprehend that the Appellate Division, Second Department's violation of state law, in conjunction with Judge William Walsh's violation of state law, resulted in the illegal deprivation to the plaintiff of his right to family, without hearing, motion or trial, a violation of the federal constitution conferring jurisdiction upon the federal

court. Judge Stewart, to support his decision, quoted Medved v. Hallows, 392 F. Supp. 656, 658 (Ed. Wis. 1975):

> "While we believe that in some instances the allegations of federal violations are based solely on alleged errors of state law, we do not rely on Medved in dismissing plaintiff's action. Rather, we dismiss the plaintiff's action on the ground that plaintiff can and should pursue redress in the New York State court system." (33) (intra 6A).

Unfortunately, and disappointingly, an experienced federal court justice found it necessary to rule that a father possessing joint custody and visitation with his children was not constitutionally deprived by the state court's illegal withholding of such family relationship without hearing, as required by law. Judge Stewart was constrained to declare that we are dealing only with misapplication of state law and not with the violation of our most sacred and historic right of

the enjoyment of our family.

Perhaps one of the most carefully guarded constitutional safeguards is the right of the citizen to a family. (Duchesne v. Sugarman, 566 Fed. 2d 17 [1977]):

> "If the state were to attempt to force the break-up of a natural family over the objections of the parents and their children without some showing of unfitness, and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the state had intruded impermissively on 'private grounds' upon which the state could not enter." (Prince v. Massachusetts, 328 U.S. 158, 166)

Furthermore, it has long been recognized that the relationship between parents and child is constitutionally protected. Quillon v. Walcott, 434 U.S. 246, 98 S.Ct. 549, 554 (1978); Weiss v. Yoder, 406 U.S. 205, 231-233 92 S.Ct. 1526, 1541-43 (1972); Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208 (1972). The due process law limits the power of the

state that questions or impinges upon the parent-child relationship. As the Supreme Court states in Quillon v. Walcott, supra:

> "We have little doubt that the due process cause would be offended 'if a state were to attempt to force the break-up of a natural family over the objections of the parents and their children without some showing of unfitness, and that the sole reason that to do so was thought to be in the children's best interest . . ."

In the case of Yalkowsky there was not even a suggestion that any of the court's actions were done for the children's best interest. Arbitrarily, criminally, visciously, illegally and without even a semblance of legal right, and under color of law, the plaintiff was deprived of his family by the Appellate Division, Second Department justices without hearing, and was denied his legal right to visitation, as well

as joint custody, and denied injunctive relief to prevent such violation of his civil rights.

Point III(B)

Judge Stewart was biased, resulting in incompetent reasoning to support his denial of due process

Judge Stewart's incompetent reasoning was utilized to support his decision. Firstly, Judge Stewart determined that:

> "The gravamen of the plaintiff's complaint against members of the Appellate Division is that the plaintiff has been repeatedly frustrated in his divorce proceedings by allegedly erroneous decisions by the Appellate Division." (intra 5A).

The gravamen of the plaintiff's complaint was not erroneous decisions, but illegal decisions. For erroneous decisions the plaintiff has recourse to appeal, which has resulted thus far in four reversals of Judge Walsh's decisions regarding the divorce proceedings. The plaintiff

is well aware of his rights regarding erroneous decisions, and has successfully protected himself in the courts. However, illegal decisions and improper acts, and abuse of discretion, and constitutional deprivations, the areas that plaintiff seeks relief in the federal court, Judge Stewart incompetently misunderstood and ignored.

Secondly, Judge Stewart incompetently determined that the plaintiff claims the ". . . state court incorrectly applied state law . . ." (intra 5A). This was never a claim advanced by the appellant.

Thirdly, Judge Stewart quoted cases and interpreted holdings which displayed incompetent reasoning by a federal court justice. In supporting his dismissal of the plaintiff's action, Judge Stewart relied "on the ground that the plaintiff

can and should pursue redress in the New York State court system (33), and in support of such decision relied in part on McNeese v. Board of Education, 373 U.S. 668, 674-675 (1963), which clearly supported the plaintiff's bringing his action in the federal courts. McNeese (supra) supported the plaintiff's case demonstratively.

> "In McNeese v. Board of Education, 373 U.S. 668 [83 S.Ct. 1433, 10 L.Ed. 2d 622] we again emphasized that abstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim. After examining the purposes of the Civil Rights Act under which that action was brough, we concluded that '[w]e would defeat those purposes if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claims in a state court.' (373 U.S. at 672, [83 S.Ct. 1433 at 1436]. For the 'recognition' of the role of state courts as the final expositors of state law implies, no disregard for the primacy of the federal judiciary in deciding questions of federal law.' England v. Louisiana

State Board of Medical Examiners, 375 U.S. 411, 415, 416 [84 S.Ct. 461, 465, 11 L.Ed. 2d 440]."

"These principles have particular significance when, as in this case, the attack upon the statute, on its face, is for repugnancy to the First Amendment. In such case, to force the plaintiff who had commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect."

Point III(C)

Judicial notice should be taken of the existence of implied, if not actual, bias against litigants bringing actions against judges in the courts

Should this Supreme Court take judicial notice of the existence of implied, if not actual, bias existing in the inter-connection and relationship of judges of the state appellate courts and the federal courts, and the traditional difficulty of judges being able to rule unfavorably of other judges?

The plaintiff contends, and facts substantiate, that Judge Stewart, when faced with a matter as sensitive as this matter before him, was incapable of performing his judicial functions, notwithstanding whether or not ex-parte influences infiltrated his courtroom; and notwithstanding his relationship with the judges involved herein. Judge Stewart was prompted to state in

response to the plaintiff's allegations of vast misconduct, "We are unwilling to accept such a sweeping indictment." The charges the plaintiff presented to Judge Stewart were beyond his ability to cope with.

Judge Stewart made a factual determination and ruled on the credibility of the plaintiff's charges without hearing, and by this display of inherent bias prevented disputation of fact and due process. Judge Stewart did all he could to avoid the consequences of the plaintiff's allegations and relied on, ". . . keep our federal hands off actions which verge on the matrimonial." (Gras v. Stevens, 415 Fed. Supp. at 1154) And to avoid the unpleasant task of performing his legal responsibilities with this matter, Judge Stewart stated:

> "We believe intervention in this matter would be similarly inappropriate, particularly when we consider how much the merits of plaintiff's divorce proceedings would enter into a determination of his claim of a right to have the Commission act on his complaint." (35, 36)(intra 16A).

This reasoning was steps beyond incompetence, and by use of any guise to avoid his responsibilities, Judge Stewart in essence ruled that the Judicial Conduct Commission, by its staff, can do anything it wishes, which has resulted in a Judicial Conduct Commission publicly condemning small town justices for ticket-fixing, and publicly reprimanding a Supreme Court justice for calling a female lawyer "little girl," when rampant corruption and the most disgraceful acts of injustice are permitted to those justices blessed with favorable contact with such Commission.

"Traditions" of unlimited discretion to state officials and "traditions of immunity to judges, when used as a tool of oppression rather than a protection from unwarranted suits, are constitutionally repugnant to the protection of the public, and are just another expression of bias. It is in the interest of the public that a tradition of reluctance on the part of the federal court to interfere with the discretion of agencies and justices that must be scrutinized by this United States Supreme Court.

Judge Stewart's reliance on Attica (supra) to uphold what would amount to unlimited discretion, which was min-interpreted as already described still leaves us with this "tradition," a "tradition" which is really a personi-

fication of bias or improper conduct rather than a legally sufficient determinant for just decisions. (intra 10A).

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.

Dated: New York, New York
September 14, 1983

Respectfully submitted,

Stanley Falkowsky

APPENDICES

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of June, One Thousand Nine Hundred and Eighty-three.

PRESENT:

HON. ELLSWORTH A. VAN GRAAFIELAND,
HON. LAWRENCE W. PIERCE,
HON. JOHN MINOR WIDSOM,*
Circuit Judges

----------x

STANLEY YALKOWSKY,

Plaintiff-Appellant,

v.

ORDER
83-7169

HONORABLE MILTON MOLLEN, Presiding Justice of the Appellate Division Second Department of the Supreme Court of the State of New York; HONORABLE DAVID T. GIBBONS, Justice of the Appellate Division Second Department of the Supreme Court of the State of New York; HONORABLE MOSES M. WEINSTEIN, Justice of the Appellate Division Second Department of the Supreme Court of the State of New York; HONORABLE GUY MANGANO, Justice of the

Appellate Division Second Department of the Supreme Court of the State of New York; and HONORABLE LEON LAZER, Justice of the Appellate Division Second Department of the Supreme Court of the State of New York,

and

ROBERT H. TEMBECKJIAN, Clerk of the Commission on Judicial Conduct of the State of New York; GERALD STERN, Administrator of the Commission on Judicial Conduct of the State of New York,

Defendants-Appellees.

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*Senior Circuit Judge of the Fifth Circuit, sitting by designation.

This is an appeal from an order of the United States District Court for the Southern District of New York, Stewart, J., dismissing appellant's action against the above-named defendants. We affirm substantially for the reasons set forth in Judge Stewart's

Memorandum Decision of February 9, 1983, with double costs to appellees.

Hon. Ellsworth A. Van Graafeland

Hon. Lawrence W. Pierce

Hon. John Minor Wisdom

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any . . .

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

STANLEY YALKOWSKY,

Plaintiff,

- against -

HONORABLE MILTON MOLLEN, ET AL.,

Defendants.
----------x

82 Civ. 4611(CES)

MEMORANDUM DECISION

STEWART, District Judge:

Plaintiff brought this action for injunctive relief pursuant to 42 U.S.C. § 1983, alleging that rulings by various Justices of the Appellate Division of the New York State Supreme Court, Second Department, violated his constitutional rights. Plaintiff further alleges that defendants Robert H. Tembeckjian and Gerald Stern, respectively Clerk and Administrator of the Commission on Judicial Conduct of the State of New York ("the Commission") violated his constitutional rights when they failed

to take action on plaintiff's complaint regarding the trial judge in plaintiff's divorce proceedings. Defendants move to dismiss the Complaint. We grant this motion.

The gravamen of plaintiff's complaint against members of the Appellate Division is that plaintiff has been repeatedly frustrated in his state divorce proceedings by allegedly erroneous decisions by the Appellate Division. It has been held that allegations that a state court incorrectly applied state law fail to state a claim for which relief may be granted under Section 1983, since that section protects only deprivation of federal constitutional and statutory law. Medved v. Hallows, 392 F. Supp. 656, 658 (E.D. Wid. 1975). In this case, however, plaintiff has alleged that the erroneous rulings deprived him of various federal

rights. While we believe that in some instances the allegations of federal violations are based solely on alleged errors of state law[1], we do not rely on Medved in dismissing plaintiff's action. Rather, we dismiss plaintiff's action on the grounds that plaintiff can and should pursue redress in the New York State court system.

General principles of equity apply to actions for injunctive relief under 42 U.S.C. § 1983. Potwora v. Dillon, 386 F.2d 74, 76-78 (2d Cir. 1967). This means that a plaintiff seeking an injunction under section 1983 must show that no adequate legal remedy exists in a state as well as a federal court. Gras v. Stevens, 415 F. Supp. 1148, 1153 (S.D.N.Y. 1976) (three judge court) (Friendly, J.). In this case, plaintiff has alleged no procedural bar preventing his appeal of adverse decisions within

the state system. Cf., McNeese v. Board of Education, 373 U.S. 668, 674-675 (1963) (plaintiffs contesting segregation in public schools need not resort to inadequate state administrative remedy before seeking federal injunctive relief). While plaintiff argues that he cannot return to the state system because that is a forum "in which decisions are made without reason; in which laws of the state are defied; where appeals can only be brought to the very parties denying the plaintiff's constitutional rights", we are unwilling to accept such a sweeping indictment.[2] Cf. Peterson v. Sheran, 635 F.2d 1335, 1340-41 (8th Cir. 1980) (appellant may not assume futility of asking alleged biased judges to recuse themselves). The subject matter of the substantive dispute underlying plaintiff's constitutional claims here make this case

especially apt for state court resolution:

> "The policy of our court will remain, the case being otherwise equal in equity, to keep our federal hands off actions which verge on the matrimonial, or impinge upon the matrimonial jurisdiction of the state courts."

Gras v. Stevens 415 F.Supp at 1154 n.6 (quoting Kamhi v. Cohen, 512 F.2d 1051, 1056 (2d Cir. 1975). For these reasons, we dismiss plaintiff's complaint as to defendants Mollen, Selkin, Gibbons, Weinstein, Mangano and Lazer.

We also dismiss that portion of plaintiff's complaint that seeks injunctive relief against defendants Stern and Tembeckjian, much that plaintiff would have us enjoin defendants Stern and Tembeckjian to do is beyond their powers as Administrator and Clerk of the Commission. That is, only the Commission itself is authorized to receive, initiate investigate and hear complaints with

respect to the conduct of any judge. See N.Y. Jud. Law § 44(1) (McKinney Supp. 1982). The Clerk and Administrator of the Commission are neither the Commission nor members of it. See N.Y. Jud. Law § 41(1) and (7) (McKinney Supp. 1982). Even if the plaintiff had named the Commission as a defendant in this action, moreover, we believe dismissal would still be required. The state statute establishing the Commission grants it broad powers of discretion in deciding whether and how far to proceed on any complaint received. See N.Y. Jud. Law § 44 (McKinney Supp. 1982). In this regard, the Commission resembles a state prosecutor's office, charged with the responsibility of determining what offenses and whom to prosecute. See Hannan v. Magistrates Court of New York, 20 Misc. 2d 509, 191 N.Y.S.2d 238, 239-240 (Sup. 908, 202 N.Y.S.2d 1002,

leave to appeal denied, 8 N.Y.2d 750, 168 N.E.2d 103, 201 N.Y.S.2d 765, cert. denied, 364 U.S. 844 (1960). Traditionally, courts are reluctant to interfere with the exercise of such discretion. See Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 383 (2d Cir. 1973). We believe intervention in this case would be similarly inappropriate, particularly when we consider how much the merits of plaintiff's divorce proceeding would enter into a determination of his claim of a right to have the Commission act on his complaint.

For these reasons, defendants' motion to dismiss the action is granted.

SO ORDERED.

United States District Judge

Dated: New York, New York
February 9, 1983

FOOTNOTES

1. For example, in Paragraph 25 of his complaint the plaintiff alleges that since he so "overwhelmingly established" the fraud of his wife's attorney and the misconduct of the trial judge, "an inference must be postulated that a scheme to 'cover up' had been instituted by certain parties wielding influence in the Appellate Division Second Department." The only basis that appears in the Complaint for the inference urged by the plaintiff is the Appellate Division's unfavorable decision. Moreover, in Paragraph 26 plaintiff alleges that an investigation must be made "to determine what factors caused the decisions that emanated from the Appellate Division." This suggests that plaintiff does not know at present "the factors", the existence of which he alleges must be inferred. This again suggests that plaintiff is really only contesting the unfavorable state court decision.

2. Indeed, several of plaintiff's most serious allegations concerning the handling of his case in the state system are contradicted by his own exhibits and submissions. Thus, while plaintiff alleges that the Appellate Division denied his motion of June 16, 1981 "without hearing", Par. 41, Ex. C to the Complaint is a 15 page affidavit by plaintiff's attorney in support of plaintiff's motion. Similarly, while plaintiff alleges that the Appellate Division's

order of June 29, 1981 denied his rights to appeal, 65-67, plaintiff in fact perfected his appeal by August 27, 1982. See Plaintiff's Reply to Defendants' Notice of Motion to Dismiss Complaint at 19.